FILED

OCT 16 1981

DAVID D. FURMAN, J.S.C.

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CPS Chemical Co.,Inc.

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION, MIDDLESEX COUNTY
DOCKET NO. C-4474-76
L-28115-76

CITY OF PERTH AMBOY, A Municipal Corporation,

Plaintiff

v.

MADISON INDUSTRIES, INC., et al.,

Defendant,

STATE OF NEW JERSEY, DEPARTMENT OF ENVIRONMENTAL PROTECTION,

Plaintiff

v.

CHEMICAL & POLLUTION SCIENCES, INC., et al,

Defendant

(CONSOLIDATED)

Civil Action

FINAL ORDER AND JUDGMENT

This action was brought on for trial before the Court sitting without a jury, David D. Furman, J.S.C, presiding, com-

mencing on June 2, 1978, May 29, 1979, and June 15, 1981, by plaintiffs, State of New Jersey, Department of Environmental Protection ("Department") by James R. Zazzali, Attorney General of New Jersey, Deputy Attorneys General Steven R. Gray and Rebecca Fields, appearing, and the City of Perth Amboy ("Perth Amboy") by Albert Seaman, Esq. and George Boyd, Esq., on the claims set forth in the Department's Amended Verified Complaint filed on November 3, 1978, and Perth Amboy's Complaint filed March 16, 1977, in the presence of defendants, CPS Chemical Co., by Lowenstein, Sandler Brochin, Kohl, Fisher & Boylan, A Professional Corporation, (Murry Brochin, Esq. and Michael L. Rodburg, Esq. appearing), and Madison Industries, Inc., by Lynch, Mannion, Martin, Benitz & Lynch (John A. Lynch, Jr., Esq. appearing), and the Court having considered the evidence and the arguments of the attorneys for the respective parties; and the Court having decided that judgment should be entered in favor of the plaintiffs, Department and Perth Amboy, and against the defendants, CPS and Madison, on the issue of defendants' liability for the pollution of surface and groundwaters and soils in the Prickett's Brook Watershed in the vicinity of defendants' industrial premises in violation of State statutes N.J.S.A. 58:10A-1 et seq. and N.J.S.A.58:10-23.11 et seq.; and the Court having considered the Department's request for specific remedial relief directing the defendants to pay for the containment and removal of the contaminants from the surface and groundwaters and soils in Prickett's Brook Watershed as well as the claim by

Perth Amboy for monetary damages; and the State having moved on July 31, 1981, for supplemental relief; therefore

IT IS on this 16 day of October ,1981,

ORDERED that judgment be and hereby is entered in favor of the plaintiffs, Department and Perth Amboy, and against CPS and Madison, based upon the findings of fact and conclusions of law set forth in the oral opinion of July 8, 1981, and in the written opinion of the Court as dated July 31, 1981, as follows:

1. There is awarded to the Department a sum not to exceed $1,820,500 to be used by the Department for the purposes outlined below in this paragraph and to be apportioned between the defendants as outlined in this paragraph:

> (a) There shall be constructed and installed a slurry cutoff wall of bentonite tied into a continuous natural clay layer in the location described in the court's expert's report (Exhibit PS-1, Appendix E, Page E-12) as modified by the Department in Exhibit PS-9, (copies of which are annexed hereto.)
>
> (b) The cost for the installation and operation of the slurry wall shall be apportioned between the defendants as follows:
>
> > (i) The cost of the construction and installation of the slurry wall is to be borne by the industrial defendants CPS and Madison in proportion to the area enclosed by the slurry cutoff wall within their respective industrial sites (i.e. Block 6303, Lots 10 and 11 respectively as designted on the tax map of

Old Bridge Township) according to a fraction, the numerator of which is the area of the enclosed premises of CPS or Madison, as the case may be, plus one half of the enclosed land area located within the slurry wall and outside both industrial premises, and the denominator of which is the total land area enclosed within the slurry wall.

2. There is awarded to the Department a sum not to exceed $1,700,000 to be used by the Department for the purposes outlined below in this paragraph and to be apportioned between the defendants as outlined below:

4 Maint. wells

(a) There shall be installed within the area contained in the slurry wall maintenance wells not to exceed four in number;

4 Decon wells

(b) There shall be installed outside of the area contained by said slurry wall decontamination wells not to exceed four in number (see generally, Exhibit PS-1, Appendix E, Page E-13 to 16);

4 years pumping from the above 8 wells without pretreatment

(c) There shall be pumping from the above referenced maintenance and decontamination wells at a rate of approximately one million gallons per day for a period of approximately four years which water will be discharged to the Old Bridge Township Sewage Authority's ("OBTSA") sewer line and then into the Middlesex County Utility Authority's ("MCUA") sewage treatment plant without pretreatment with the exception of such sludge dewatering and heavy metal removal as may be required by the MCUA or by the Department for discharges in the normal course to the MCUA system (see generally, Exhibit PS-1, Appendix E, Page E-13 to 16);

(d) Should pretreatment for the removal of metal contaminants from the water

pumped as described in paragraph "c" above, be required, there shall be constructed and installed a plant for the treatment and removal of heavy metals (Exhibit PS-1, Appendix E, Page E-18). This treatment plant shall be operated for a period of approximately four years (Exhibit PS-1, Appendix E, Page E-19);

construct & operate Force main To SAN Sewer for 4 years

(e) There shall be constructed and installed a "force main" or pipeline to convey pumped waters to the MCUA system (Exhibit PS-1, Appendix E, Page E-20). This force main or pipeline shall be operated for a period of approximately four years (Appendix B, estimate SW700-2);

Monitoring wells number not specified

(f) There shall be constructed and installed monitoring wells to monitor the progress and efficacy of decontamination; these wells may be sampled and the samples analyzed.

(g) The cost for the remedial measures outlined in this paragraph "2", not to exceed $1,700,000, shall be divided equally between the industrial defendants, CPS and Madison, except that the cost of any heavy metal removal and sludge dewatering as may be required by the MCUA or by the Department (i.e. the cost of constructing and operating a plant for the removal of heavy metals) shall be borne solely and exclusively by Madison.

3. There is awarded to the Department a sum of $583,000 to be used by the Department for the purposes outlined below:

Reroute Prickett's Brook

(a) Prickett's Brook shall be rerouted to the south of the industrial sites of CPS and Madison (Block 6303, Lots 10 and 11 respectively) in accordance with the location depicted in Figure 44 in Exhibit PS-1 or in such a manner that it completely bypasses the industrial activities on the sites of CPS and Madison;

(b) The rerouting shall be accomplished in accordance with specifications to be

developed by the Department or by a contractor selected by the State in accordance with any applicable State bidding laws;

(c)The cost of rerouting Prickett's Brook shall be borne equally by the defendants.

4. The implementation of the remedial measures outlined in paragraphs "1", "2", and "3" of this Order shall be accomplished in accordance with specifications to be developed by the Department or by a contractor selected by the Department in accordance with any applicable State bidding laws. The specifications shall be submitted to the defendants and Perth Amboy before becoming final and shall be subject to approval by the Court.

5. All of the sums which the defendants are required to pay hereunder except that required by paragraph 8 shall be paid in installments in the nature of progress payments within 20 days after presentation of (a) an invoice from the contractor who is doing the work for which the payment is required and (b) a certificate from the State that the particular work for which payment is to be made has been completed to its satisfaction. The award of $100,000 to Perth Amboy set forth in paragraph 8 shall be enforceable at the time and in the manner applicable to a judgment at law.

6. There is awarded to Perth Amboy and against Madison a sum of $585,000 to be used by Perth Amboy for the purposes outlined below in this paragraph:

(a) Three hundred and thirty thousand dollars ($330,000) of the award to

Perth Amboy under this paragraph shall be used for the purpose of mechanically and hydraulically dredging the sediments of Prickett's Pond and a portion of Prickett's Brook (Exhibit PS-1, Appendix E, Page E-1 and 2);

(b) Two hundred and fifty-five thousand dollars ($255,000) of the award to Perth Amboy under this paragraph shall be used for the purpose of disposing of the dredged sediments from Prickett's Pond and Prickett's Brook on the site of Perth Amboy's Prickett's Brook watershed property in a manner approved by and acceptable to the Department. This figure shall include the cost of lining and covering the sediments in a manner acceptable to the Department. This figure shall also include engineering and professional fees incurred in connection with the onsite disposal operation, but shall not include attorney's fees;

7. There is awarded to Perth Amboy and against CPS a sum not to exceed $430,000 which sum of money shall be used by Perth Amboy for the purposes outlined below in this paragraph:

City's Award

(a) The award of the sum of four hundred and thirty thousand dollars shall be used for the purpose of pumping pond water out of Prickett's Pond and disposing of the pumped waters into the MCUA system.

This figure shall include engineering and other professional fees associated with the pumping and disposal, but shall not include attorney's fees;

(b) The pumping of pond water out of Prickett's Pond shall be accomplished by the same contractor, engineer, or consultant retained by Perth Amboy for the purpose of dredging the sediments from Prickett's Pond as more fully described in paragraph "6" above;

(c) The pumping of pond water from Prickett's Pond shall be coordinated with and conducted in a manner consistent with all other remedial measures ordered in paragraphs "1", "2", "3", and "6" in this Order; in addition, the order of proceeding with respect to the remedial measures herein directed shall be in the discretion of the Department.

8. There is awarded to Perth Amboy and against Madison and CPS damages in the amount of $100,000 for the loss of four years of the beneficial use of Perth Amboy's property located within the affected area of Prickett's Brook watershed;

(a) The award shall include any and all taxes due and payable by Perth Amboy on the affected property;

(b) CPS and Madison shall be jointly and severally liable for the award under this paragraph with the right of contribution to each.

9. Perth Amboy's other claims for punitive damages and for other money damages are denied; provided however that the award of damages to Perth Amboy presumes that the measures ordered by this Court for restoration of Prickett's Brook watershed within four years' will succeed and is without prejudice to any future claim for damages if these measures fail or if, before four years time, the water needs of Perth Amboy exceed the capacity of the presently operating wells in the Tennants Pond area.

10. The award of monies to the plaintiffs as listed in paragraphs "1", "2", "3", "6", and "7" of this Order include an amount representing 10% inflation for the period between the date of the Dames & Moore Report (October 1980) and the date of the trial (June, 1981).

11. Within 90 days of the execution of this Order, Madison must completely remove the piles of exposed zinc, lead, and cadmium presently stored in an unprotected manner on its industrial premises or provide, in a manner approved by the Department for the enclosure and covering of these materials within a shed or other structure.

12. The motion of the Department on July 31, 1981, to modify in accordance with paragraphs "1", "6",and "7" of its motion the findings and conclusions of the Court concerning liability and the apportionment of monies allocated for the implementation of the ordered remedial measures is denied.

13. The Department's motion on July 31, 1981, to impose joint and several liability on the defendants for the cost of implementing the remedial measure set forth in this Order is denied; the defendants shall each be liable only for the obligations, and for no more than the amounts, expressly imposed upon it by this Order and Judgment.

14. The plaintiffs shall be granted access to the industrial sites of the defendants on reasonable notice, at reasonable times, and in a reasonable manner for the purpose of implementing the remedial measures described above and for supervising the implementation of these measures and the plaintiffs and their agents and contractors, subject to the same requirements of reasonableness, shall be permitted to sample and extract waters from all monitoring wells located on the industrial sites of the defendants

including those wells installed by the Department and by the defendants.

15. A reasonable fee for services heretofore rendered by Dames & Moore as the court expert, to the extent that it has not already been paid by the defendants, may be included in court costs and taxed to the defendants in the usual manner, with notice to the defendants and an opportunity to contest the reasonableness of the fee.

16. Jurisdiction of this matter is hereby retained by the Court and any party may apply upon due notice in connection with the enforcement thereof.

17. Defendants CPS and Madison and plaintiff Perth Amboy having advised the Court that each of them intends to appeal from this Final Order and Judgment, and a stay of the judgment pending appeal having been requested, the application for such a stay pending appeal is hereby DOF

David D. Furman, J.S.C.

[illegible], 51 Order
(Oct. 51)

C.P.S. - MAD. IND.

State	C.P.S.	M.I.
1,920,500 ✓	910,250	910,250
1,700,000 ✓	850,000	850,000
583,000 ✓	291,500	291,500
$4,103,500	$2,051,750	$2,051,750

Perth Amboy

State	C.P.S.	M.I.
$585,000		$585,000
430,000	$430,000	
$100,000	$50,000	$50,000
$1,115,000	$480,000	$635,000
$5,218,500	$2,531,750	$2,686,750

APR 20 1983

NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE COMMITTEE ON OPINIONS

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
A-1127-81T3
A-1276-81T3
(Consolidated)

CITY OF PERTH AMBOY, a
municipal corporation,

Plaintiff-Respondent,
Cross-Appellant,

v.

MADISON INDUSTRIES, INC.,
et al.,

Defendants-Appellants,
Cross-Respondents.

- - - - - - - - -

NEW JERSEY DEPARTMENT OF
ENVIRONMENTAL PROTECTION,

Plaintiff-Respondent,
Cross-Appellant,

v.

CHEMICAL & POLLUTION SCIENCES,
INC., et al.,

Defendants-Appellants,
Cross-Respondents.

Argued February 28, 1983. Decided APR 21 1983

Before Judges Bischoff, J. H. Coleman and
Gaulkin.

On appeal from Superior Court of New Jersey,
Chancery Division, Middlesex County.

William J. Bigham argued the cause for Madison Industries, Inc., appellant, cross-respondent (Sterns, Herbert & Weinroth, attorneys; Mr. Bigham, of counsel; Mr. Bigham and Vincent J. Paluzzi, on the brief).

Michael L. Rodburg argued the cause for appellant, cross-respondent Chemical & Pollution Sciences, Inc. (Lowenstein, Sandler, Brochin, Kohl, Fisher & Boylan, attorneys; Murry D. Brochin, of counsel; Mr. Brochin, Michael L. Rodburg and Ms. Wertheim, on the brief).

Albert W. Seaman argued the cause for City of Perth Amboy, respondent, cross-appellant.

Steven R. Gray, Deputy Attorney General, argued the cause for New Jersey Department of Environmental Protection, respondent, cross-appellant (Irwin S. Kimmelman, Attorney General of New Jersey, attorney; Deborah T. Poritz, Deputy Attorney General, of counsel; Mr. Gray, on the brief).

PER CURIAM

These appeals and cross appeals are from the final order and judgment entered in these consolidated actions in favor of plaintiffs, City of Perth Amboy and the New Jersey Department of Environmental Protection (DEP), against defendants, Chemical & Pollution Sciences, Inc., (CPS), and Madison Industries, Inc., (Madison). The trial judge found that organic chemical emissions from CPS and heavy metal emissions from Madison entered the groundwater and the waters of neighboring

Prickett's Brook resulting in contamination of an adjacent well field owned by the City of Perth Amboy. Statutory authority for a specific remedy to this pollution, created by the Spill Compensation and Control Act, N. J. S. A. 58:10-23.1(g)(c), and the Water Pollution Control Act, N. J. S. A. 58:10A-10c(3), was invoked by the trial court to compel contribution by both industrial defendants for the cost of DEP's recommended program for restoration of Pricketts Brook watershed.

The remedy ordered by the court provided for: (1) construction and operation of a slurry cutoff wall three to five feet thick of an impermeable substance surrounding the two industries at their boundaries to a depth of approximately 70 feet and anchored in the South Amboy fire clay layer underlying the aquifer; (2) installation of four maintenance wells within the slurry cutoff wall, four decontamination pump wells outside the slurry cutoff wall and monitoring wells to determine contamination levels; (3) diversion of Prickett's Brook to a new channel to the south and east bypassing the two industries; (4) dredging, pumping and disposal of contaminated sediments of Prickett's Pond.

The trial court ordered that the contaminants which are to be pumped from the area may be discharged into a Middlesex County Utilities Authority interceptor through a constructed pipeline. Dredged metal contaminants are to be pretreated if necessary in a plant to be constructed at Madison's expense.

The cost of the slurry cutoff wall is to be borne by the defendants in proportion to the area enclosed by the slurry cutoff wall within their respective industrial sites. The cost of the construction and operation of the wells and the diversion of Prickett's Brook is to be shared equally by both defendants. The cost of heavy metal removal and sludge dewatering is to be borne by Madison. The cost of pumping pond water out of Prickett's Pond and disposing of the pumped waters into the Middlesex County Utilities Authority system is assessed against CPS. The total cost of the corrective measures is 5.2 million dollars. Each defendant is held to be only severally liable for its share of the total costs for the corrective measures. In addition, Madison and CPS are held jointly and severally liable to Perth Amboy for damages in the amount of $100,000 for the loss of use of its watershed during the four year projected duration of the cleanup program.

In these appeals defendants and the City of Perth Amboy question the propriety of the remedial measures claiming a lack of credible evidence to support the efficacy, necessity and fairness of the ordered cleanup and removal methods. We are persuaded that such uncertainty as exists regarding the ordered use of these particular methods does not warrant a new trial as to remedy. The proofs demonstrate extensive toxic pollution of the Perth Amboy watershed directly attributable to defendants' activities. Liability for the contamination is not contested in these appeals. We recognize, as did the trial judge, that the experimental nature of the possible remedial methods available under current technology precludes an absolute guarantee of success. Nevertheless, reasonable success with the ordered measures is indicated by the testimony of the court appointed expert. This reasonable probability, considered with the dangers to public health and safety inherent in an alternative plan such as the abandonment of the watershed, necessitates an attempt at cleanup. We find sufficient credible evidence in the record to support the findings and conclusions of the trial court. Rova Farms Resort v. Investors Ins. Co., 65 N. J. 474, 484 (1974).

In its cross-appeal, the City of Perth Amboy contends that the award of $100,000 in damages is grossly inadequate. This figure represents the loss of the beneficial use of Perth Amboy's property located within the affected area of Prickett's Brook watershed as a water resource for the four year period of the cleanup program. At trial, the city proposed to abandon the watershed and sought damages for the permanent loss of its property and for loss of the water itself.

We agree with the trial court's determination that the city's plan to abandon the use of the watershed was not as responsive to the public interest as the DEP's plan to restore and purify this water source. The DEP proposal is intended to safeguard the future water supply of the city and other downstream users. The city's claim for damages for loss of the water itself was denied because the city's water needs were being met by the suction and pump wells of another city watershed. The trial court's assessment of $100,000 damages presumes that the remedial measures ordered will succeed within four years and is without prejudice to any future claim for damages if these measures fail

or if, before four years time, the water needs of the city exceed the capacity of the city's presently operating wells. We affirm the damage award to the City of Perth Amboy. Since the court correctly wanted to see if the ordered remedies would work, it did not intend for the monetary aspect to be final. The court used its equitable power to fashion remedies which include the present payment of money, installation of cleanup procedures and future damages to the city if the cleanup measures do not work. This is highly desirable and we, therefore, affirm that aspect of the judgment.

In its cross-appeal, DEP alleges two grounds for error in the trial court's decision. First, it is claimed that joint and several liability should have been assessed against CPS and Madison. Second, the liability of the defendants for the costs of abating their pollution should not have been limited to a specific figure.

The trial court's division of costs between defendants reflects the court's apparent concern with the fact that the contamination by Madison and CPS

were distinct, one being of heavy metals and the other of organic compounds. Under common law tort principles, damages for harm are to be apportioned among two or more causes where there are distinct harms, or there is a reasonable basis for determining the contribution of each cause to a single harm. Hill v. Macomber, 103 N. J. Super. 127 (App. Div. 1968); Prosser, Law of Torts (4 ed. 1971), §52 at 313.

As a practical matter, however, we find that the harm caused in the present case is indivisible in that the pond would have been contaminated as a water source from either of defendant's actions and the pond cannot be decontaminated unless both defendants fulfill their obligations to reimburse DEP for the costs of the remedial measures ordered by the court. Without an assessment of joint and several liability, either defendant's failure to meet the financial obligation imposed by the judgment would leave DEP in a position where it has insufficient funds from defendants to abate the contamination. The efficacy of the remedial measures ordered by the court, such as the construction of a slurry wall and rerouting of the brook, depends on completion.

Under both common law principles and relevant statutory law, the public need not bear such a burden as against a responsible party. See Landers v. East Texas Salt Water Disposal Co., 248 S.W. 2d 731 (Tex. 1952); Environmental Protect. Dep't. v. Ventron Corp., 182 N. J. Super. 210 (App. Div. 1981), certif. granted ___ N. J. ___ (1982). Moreover, the Spill Compensation and Control Act, N. J. S. A. 58:10-23 11g(c), requires that any person who has discharged a hazardous substance shall be strictly liable, jointly and severally, without regard to fault, for all cleanup and removal costs. Accordingly, we impose joint and several liability for payment of all costs to DEP for all remedies ordered by the court which are to be implemented by DEP. The proportionate allocation approach used by the court to assess the costs of the remedies between defendants was both reasonable and equitable and should be followed amongst the defendants.

DEP's second contention that the court improperly limited defendants' liability to 5.2 million dollars to remedy the contamination is most persuasive. That sum may prove to be grossly inadequate to implement the

ordered remedies. Under both the Spill Compensation and Control Act, N. J. S. A. 58:10-23.11g(c), and the Water Pollution Control Act, N. J. S. A. 58:10A-10c(3), the court is empowered to order that all costs to abate water pollution be paid by those adjudged liable for violating the law. These are specially created statutory remedies and are not, therefore, subject to common law requirements that plaintiff be limited to those specific present and prospective damages which he can prove at the time of trial. Rather, the intent of the statute is to charge those found to be responsible for pollution with the actual costs of cleanup. The implementation of this statute necessarily requires that unforeseen expenses and contingencies be considered. An accurate assessment of the prospective cost of the cleanup program is not possible considering the unknowns to be encountered in the course of employing the untried, innovative technology requried in toxic waste removal plans. In the present case, the exact placement depth of the slurry cutoff wall has not yet been determined pending final investigation of the exact depth of the South Amboy fire clay layer at relevant points underlying the aquifer. Nor is it certain whether a treatment

plant for metal contaminants will have to be built. These and other final decisions concerning exact methods and specifications await further study and could significantly impact upon the court's cost estimates.

In light of these uncertainties, it is quite possible that the 5.2 million dollars ordered by the court will not accurately reflect the eventual costs of implementation. Therefore, defendants are hereby obligated to pay all cleanup and removal costs actually incurred by DEP in implementing the remedies ordered by the court and are not limited to the amounts expressly imposed by the trial court's order and judgment.

Our reliance on statutory authority to require defendants to pay the costs of certain remedies does not negate our concern for fairness to defendants. The reasonableness of the costs imposed upon defendants, however, is adequately safeguarded by the provision of the trial court's judgment which provides that implementation of the remedial measures ordered "shall be accomplished in accordance with specifications to be developed by the Department [DEP] or by a contractor selected by the Department in accordance with any applicable State bidding laws.

The specifications shall be submitted to the defendants and Perth Amboy before becoming final and shall be subject to approval by the Court." This provision allows the parties to have continued access to the Chancery Division to settle the reasonableness and necessity of any of the specifications or costs to be incurred. It should be remembered that lengthy delays will probably increase the ultimate costs and might also compel the court to consider some form of security to insure payment by defendants.

Finally, defendants contend that the trial court erroneously required them to pay the fees of the court appointed expert. This contention is unpersuasive. In a complex case such as this one, it was quite appropriate for the court to have the benefit of a neutral expert. The power of the court to appoint experts to assist the court and to assess the costs against any of the parties lies within the discretion of the Chancery Division. Azalone v. Azalone Brothers, Inc., 185 N. J. Super. 481, 489 (App. Div. 1982); see 12 A. L. R. 375 (1957), "Judicial Authority to Call Expert Witnesses." Here, the exercise of that power does not represent an abuse of discretion. The amount and reasonableness of the fees awarded Eames & Moore and whether they are

entitled to prejudgment interest and counsel fees to collect their expert fees must still be resolved in the appeal and cross appeal filed under Docket No. A-3550-82T3. Since that appeal was only filed on April 5, 1983, it is not ready for disposition.

In summary, we affirm the provisions of the remedial plan, the damage award to Perth Amboy, and the requirement that defendants pay the court appointed expert's fees. We modify the judgment to impose joint and several liability against both defendants for the actual costs of cleanup and removal of the organic and metal contamination for which they have been found liable. This matter is remanded to the Chancery Division to implement its judgment as modified by this opinion. We do not retain jurisdiction.